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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

JULES GORDON, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JULES GORDON, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 1, 1957.

OPINION BELOW

The opinion below has not yet been reported, either as originally filed (Appendix A(1), pp. 1a-10a) or as amended on denial of rehearing (Appendix A(2), p. 11a).

JURISDICTION

The judgment of the court of appeals (Appendix B, p. 12a) was entered on March 1, 1957. A timely petition for rehearing was denied, with modification of the opinion, on April 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, where an indictment alleges a conspiracy to violate the statute prohibiting an attempt to defeat or evade a tax, such conspiracy involving the rendering by a revenue agent of a false report understating the taxpayer's tax liability, the conviction of a co-conspirator can be sustained in the face of the revenue agent's acquittal and in the absence of competent proof that the revenue agent's report was in fact false.

2. Whether an expert witness's conclusions as to what was shown by voluminous records is competent, over objection, where those records are neither offered in evidence nor made available at the trial.

3. Whether, in a prosecution for conspiracy to commit a substantive crime, it is a sufficient definition of such substantive crime simply to read the indictment to the jury.

4. Whether, in order to sustain the present conviction, the court below so far departed from its previous rules as to the admissibility of evidence and as to the sufficiency of a charge in a conspiracy case that an exercise of this Court's supervisory powers is called for.

STATUTES INVOLVED

1. Section 145(b) of the Internal Revenue Code of 1939 provides:

"**§ 145. Penalties.**

* * * *

"**(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under

this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2. Title 18, Section 371, United States Code, provides:

"§ 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

STATEMENT

Petitioner was indicted, together with one Tanz, an Internal Revenue Agent, for conspiring in violation of 18 U.S.C. § 371, quoted above, to commit an offense against the United States, viz., to willfully attempt to evade and defeat a large part of the income tax due and owing to the United States by Alfred and Doris McClure for the year 1948, in violation of 26 U.S.C. § 145(b). The indictment (App. 2a-3a)* alleged that the conspiracy was

*"App." refers to the Appendix filed by petitioner below and there designated Appellant's Appendix. "U.S. App." refers to the Appendix filed by the Government below and there designated Appellee's Appendix. Nine extra copies of each have been filed.

to be effectuated by Tanz's filing of a false and fraudulent report to his superiors in the Bureau of Internal Revenue which would understate the tax due from the McClures, and that petitioner, Tanz, and one Harper, McClure's accountant who was named as a co-conspirator but was not indicted, would exact money from Alfred McClure in consideration of Tanz's filing of a false report.

Tanz was also separately indicted for a further conspiracy (App. 313a).

Tanz was acquitted under both indictments (App. 324a); petitioner was convicted (*id.*), and on appeal his conviction was affirmed.

The McClures were residents of Troy, Pa., where Alfred McClure was a Ford-Mercury dealer during the tax years in question (App. 15a). They filed their income tax returns for the years 1947 and 1948, showing tax due in the respective amounts of $1,808.50 and $1,315.70, which they paid (Ex. G-1; Ex. G-2, U. S. App. 11b).

In April 1950, Tanz visited McClure's place of business to make an income tax audit of the taxpayer's books and records covering the years 1947 and 1948 (App. 38a, 141a). Several weeks later, Tanz returned and met McClure's accountant, Harper (App. 140a).

On May 22, 1950, Alfred McClure had his brother deliver to Harper a check to the latter's order in the amount of $5,000, to apply to additional income taxes which might be due (App. 51a, 96a, 149a, 173a, 174a; Ex. G-8, U. S. App. 20b-21b). McClure charged this check to his income tax account on his books (App. 136a). At this time McClure had expected that the total amount of the additional taxes would be about $9,500 (App. 51a, 69a). He was told this by Harper, who did not explain how the figure was arrived at (App. 90a-91a).

In June or July 1950, McClure engaged an independent firm of accountants to audit his books and to determine the

correct amount of tax owing, if any, and those accountants after completing the audit advised him that additional taxes were due in the amount of around $4,300 (App. 57a, 60a-65a).

When Harper met Tanz at McClure's place of business in Troy in April 1950, Tanz said that the taxes due for 1947 and 1948 would be approximately $17,000 (App. 141a). Tanz sought to complete his examination, and accordingly wrote to Harper in May 1950, stating that he had received no reply to his previous letter to McClure (App. 195a; Ex. D-1, U. S. App. 26b).

As a result, Harper went to Philadelphia on June 10, 1950, where he met Tanz at the latter's home, after trying to reach him at his office (App. 195a). Tanz had also requested the presence of McClure (App. 147a), but the latter did not attend (App. 149a).

At their meeting, Tanz told Harper that McClure's taxes would probably be less than $17,000, and that the matter could probably be closed for a final tax of between $8,000 and $9,000 (App. 150a-151a). At this time, also, Tanz told Harper that he would refer a friend to him who could assist (App. 151a). Later that day, a man, identified by Harper at the trial as petitioner, met Harper in Philadelphia, introduced himself as Mr. Jones, and told Harper that, as soon as he obtained the work papers from Tanz, he would get in touch with Harper (App. 151a).

On June 21, 1950, Tanz filed his audit report showing additional taxes due by the McClures in the amount of $4,037.35 (Ex. G-6; U. S. App. 15b-18b).

In July 1950, petitioner, by telephone, arranged a meeting with Harper for several days later in Wilkes-Barre (App. 152a-153a). At this meeting, petitioner told Harper that he had effected a computation, and that the tax would run between $8,000 and $9,000 (App. 153a). Harper then gave petitioner $3,000 in cash, which he had obtained by

cashing the check McClure had previously given him (App. 153a-154a). Harper, a government witness, testified that his purpose was to pay the tax owed to the United States (App. 177a).

Early in September 1950, Harper received from the Internal Revenue Service the McClure tax bills, showing a tax due in an amount in excess of $4,000 for 1947 and 1948 (App. 155a). The principal sum shown in that bill to be due for 1948, $492.80 (Ex. G-5, U. S. App. 14b), was identical with the additional tax for 1948 shown to be due in Tanz's report (Ex. G-6 at U. S. App. 15b). Harper immediately complained to Tanz, by telephone, that the $3,000 he had given to petitioner was not shown as a credit (App. 155a), and Tanz said he would have to call back (App. 157a).

Subsequently, petitioner called Harper, and a meeting was arranged with Harper and McClure in Elmira, N. Y. (App. 157a). McClure, Harper, and petitioner, who was introduced as Smith, met, together with McClure's independent accountants (App. 156a). Petitioner spoke to McClure privately, and asked him to pay the tax bills (App. 94a). Petitioner returned $2,500 of the money Harper had given him, retaining $500 as a fee (App. 94a, 111a). Harper returned $1,800 to McClure, deducting $200 for his expenses (App. 178a). McClure made out his check in payment of the tax bills, in the amount of $4,575.63 (App. 96a; Ex. G-9, U. S. App. 22b-23b).

Harper did not intend to help McClure evade and defeat his tax, nor was he trying to cheat the government, nor did he make any agreement with petitioner or Tanz to help cheat the government (App. 198a). He did not make any agreement with anybody that he would corrupt anybody (App. 199a). He did not make any agreement with petitioner to attempt to defeat a large part of McClure's taxes (App. 203a). He did not give the $3,000 to petitioner to bribe Tanz to make a false report (App. 205a).

As part of its case in chief, the Government adduced the testimony of an expert, the Revenue Agent Tinsley (App. 214a). Tinsley testified that there was a distinction between a "field audit" and a "complete audit," and that an internal revenue agent must use his judgment concerning the extent of his audit (App. 252-257a).

Tinsley further testified that in June 1952 he had made a "complete audit" of McClure's books—not a "tax audit" (App. 259a)—and that the complete audit required twenty-six days, with the assistance for ninety per cent of the time of another agent, and for ten per cent of the time of a third agent (App. 251a).

Tinsley was unable to say whether the books were in the same condition as when seen by Tanz (App. 259a). He knew that McClure's independent accountants had worked on the books and made adjusting entries (App. 261a), and said he took such entries into consideration (App. 262a).

Tinsley testified at length that there were various items which he allowed and disallowed, based upon his own examination of McClure's books, vouchers, receipts, etc., and upon his investigation (App. 218a-252a). None of the books, vouchers, receipts, etc., were introduced in evidence, but all remained at the McClure place of business in Troy, Pa. (App. 258a).

Counsel for Tanz objected to the witness Tinsley's testimony to his conclusions as to what the records showed in the absence of those records (Tr. 221a, 223a, 250a-251a, 258a-259a), and at the conclusion of his testimony moved to strike it (App. 306a), "because it was based upon records not produced, not offered in evidence, and therefore it violates both the hearsay rule, the best evidence rule." Counsel for petitioner joined in those objections in his motion for judgment of acquittal (App. 307a-308a). The motion to strike Tinsley's testimony was denied (App. 306a).

In his charge to the jury, the district judge covered the elements of the offense of conspiracy (App. 316a-319a). He did not define the substantive offense that the defendants were charged with conspiring to violate but merely read the indictment to the jury (App. 314a). Petitioner's trial counsel did not except or object to the charge.

As has been indicated, petitioner was convicted, while Tanz was acquitted on both indictments. Petitioner's renewed motion for judgment of acquittal and in the alternative for a new trial (App. 325a-326a) was denied (App. 1a), and petitioner was sentenced to a year's imprisonment and a fine of $1,000 (*id.*).

On appeal, the judgment of conviction was affirmed, the court below saying (Appendix, *infra*, pp. 9a-10a) that "it was not necessary to prove the falseness of the Tanz report in order to sustain the conviction of Gordon on the charge of conspiracy," citing *United States* v. *Albanese*, 224 F. 2d 879, 882. A petition for rehearing was denied, though the court amended its opinion to eliminate the earlier erroneous statement that Harper's denial of the existence of a conspiracy had been stricken from the record (Appendix, p. 11a, *infra*).

REASONS FOR GRANTING THE WRIT

Opinions in this Court, particularly in recent years, have repeatedly reflected an awareness of the dangers implicit in prosecutions for conspiracy. See *Gebardi* v. *United States*, 287 U.S. 112, 122; *Kotteakos* v. *United States*, 328 U.S. 750, 776-777; *Von Moltke* v. *Gillies*, 332 U.S. 708, 721-722, 727-729; *Krulewitch* v. *United States*, 336 U.S. 440, 445-458; *Nye & Nissen* v. *United States*, 336 U.S. 613, 625-626. Those dangers appear in a new context here.

1. The gravamen of the present indictment was that petitioner, Tanz, and Harper conspired to defeat the tax owing by the McClures; the gist of the conspiracy alleged in the indictment, and the only possible way by which that

conspiracy could be effected, would be for the revenue agent Tanz to make a false report to his superiors in the Internal Revenue Service concerning the McClure's tax liability (App. 2a-3a). No other conspirator could possibly do this; a false official report was essential to the object of the conspiracy alleged, and only Tanz could make an official report. If Tanz's report were not false but truthful, then there was no tax owing by the McClures that could be defeated.

Harper was not indicted, and Tanz was acquitted. As the court below pointed out (Appendix, pp. 4a-6a), petitioner could consistently with Tanz's acquittal be convicted of conspiring with Harper. But he could only be convicted of conspiring with Harper to do what he was charged with doing, viz., to defeat a tax due. And, unless Tanz's report was willfully and knowingly false, there would be no conspiracy to defeat a tax, but only a conspiracy to obtain money from McClure by false pretenses—which was not the offense charged in the indictment.

Therefore the falsity in fact of Tanz's report was essential to a conviction of each of the indicted conspirators—and no competent proof of such falsity appears in the record.

Tanz reported a tax deficiency covering both 1947 and 1948 of $4,037.35 (Ex. G-6; U.S. App. 15b-18b). This was in accord with the figure arrived at by McClure's independent accountants (App. 57a, 60a-65a), and was likewise in accord with the sum paid by McClure (App. 96a; Ex. G-9, U.S. App. 22b-23b).

The only testimony tending to show error in Tanz's report was that of Tinsley, on the basis of an examination of McClure's books that had lasted 26 days and was made by Tinsley with the assistance of two other agents (App. 251a). Tanz's examination had covered only 2 days and 6 hours (Ex. G-6 at U.S. App. 15b). But Tinsley's testi-

mony consisted only of conclusions drawn by him from a mass of records neither produced in evidence nor available at the trial (App. 258a) and so was plainly incompetent. *United States* v. *Ward*, 169 F. 2d 460 (C.A. 3); *United States* v. *Michener*, 152 F. 2d 880 (C.A. 3). It is only when the original books themselves are available that the summaries become admissible. *United States* v. *Augustine*, 189 F. 2d 587 (C.A. 3).

It is literally impossible to follow the reasoning on this point of the court below, which said (Appendix, pp. 9a-10a):

> "* * * it was not necessary to prove the falseness of the Tanz report in order to sustain the conviction of Gordon [the present petitioner] on the charge of conspiracy. See United States v. Albanese, 224 F. 2d 879, 882 (C.A. 2, 1955). If it were error, only Tanz would have been prejudiced and, as we have seen, Tanz was acquitted."

But actually, as has been pointed out, petitioner would likewise be prejudiced, since the falsity of Tanz's report was the vital element in any conspiracy to defeat taxes. And the *Albanese* case at the page cited holds only that a taxpayer can, without signing a tax return, violate § 145(b) by other means. *Albanese* is plainly irrelevant here, where the issue does not concern the taxpayer's return, but rather the revenue agent's official *report* concerning that *return*, and where the revenue agent and those alleged to have conspired with him to violate § 145(b) could not possibly have fallen within that statute unless the revenue agent's return was false in fact. For, if no tax is due, then there can be no conviction either under § 145(b) or under a charge of conspiracy to violate § 145(b). *United States* v. *Schenck*, 126 F. 2d 702, 704 (C.A. 2).

Therefore, since there was no competent proof of the indispensable ingredient of the conspiracy charged in the indictment, viz., the falsity of the Tanz report, it follows

that petitioner's conviction under that indictment cannot be sustained.

2. The district judge in charging the jury outlined the elements of the offense of conspiracy at length (App. 316a-319a), but did not define the substantive offense that petitioner was charged with conspiring to commit; on that point he merely read the indictment (App. 314a). This is plainly insufficient. "A trial court does not discharge its duty merely by quoting a statute relevant to the conduct of the trial." *United Brotherhood* v. *United States*, 330 U.S. 395, 416, *per* Frankfurter, J.

It is true that there was no objection to the charge, but a long line of cases in the court below establishes that a trial judge's failure to define the offense is error so plain and vital that it requires reversal on appeal even in the absence of objection. *United States* v. *Lang*, 239 F. 2d 676; *United States* v. *Cumberland*, 200 F. 2d 609; *United States* v. *Petrie*, 184 F. 2d 417; *United States* v. *Pincourt*, 159 F. 2d 917; *United States* v. *Max*, 156 F. 2d 13; *United States* v. *Noble*, 155 F. 2d 315; *United States* v. *Levy*, 153 F. 2d 995. Reading the accusation to the jury cannot stand on any higher footing than letting the jury read it for themselves, a practice condemned as insufficient in the *Noble* case, *supra*. And the failure of a trial judge to define the substantive offense in a conspiracy case is, certainly in the court below, fundamental error requiring reversal. *United States* v. *Yasbin*, 159 F. 2d 705.

It is no answer to say, as the Court below did (Appendix, pp. 7a-9a), that the offense under § 145(b) of the Internal Revenue Code of 1939 is so simple that it does not need to be defined. Litigation in that court, and elsewhere, establishes that the proper definition of the elements requisite to a violation of § 145(b) presents a problem of very considerable difficulty. *United States* v. *Martell*, 199 F. 2d 670 (C.A. 3); *Forster* v. *United States*, 237 F. 2d 617 (C.A. 9), and cases there cited.

And the court below did not undertake even to suggest why its previous decisions as to the necessity for defining in the charge the elements of the offense alleged even in the absence of request therefor had now suddenly become inapplicable. Its earlier rulings were neither disapproved nor distinguished; they were simply ignored. A different rule was applied to this petitioner than had been previously applied to persons in his precise position.

3. There is presented here, therefore, a situation where the conviction of one indicted conspirator is upheld only in disregard of the essential element of the conspiracy; in disregard of a settled rule of evidence; and in disregard of a settled rule as to the need for advising the jury as to the nature of the substantive offense which the defendants are alleged to have conspired to violate.

It is therefore well nigh impossible to avoid the conclusion that petitioner's conviction was sustained, not through the application of rules of law hitherto well recognized, but in disregard of those rules, essentially because petitioner was deemed to be an unworthy person who appeared to have harbored an evil intent and was guilty of evil thoughts.

Thus the dangers heretofore believed to be implicit in prosecutions for conspiracy are shown to be real and not merely chimerical. The present case, accordingly, calls for review by this Court, lest the offense of conspiracy be now employed, as in this instance, to deal with ill-intentioned persons in a manner not otherwise lawful, viz., by charging them with one crime and convicting them of another. *Cole* v. *Arkansas*, 333 U.S. 196; *Schooner Hoppet* v. *United States*, 7 Cranch 389, 394.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1957.